Yogananthy a/p AS Thambaiya v Idris bin Osman

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–169 OF 2002
RAMLY ALI, SURIYADI AND AZHAR MA'AH JJCA
22 JULY 2009

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Civil Procedure — Absence of party — Absence of plaintiff and plaintiff's counsel at hearing — Plaintiff's claim dismissed and defendant's counterclaim allowed — Application to reinstate claim and to set aside counterclaim — Whether absence intentional or deliberate — Whether genuine miscommunication of trial dates — Whether merits shown in claim and in defence to counterclaim — Rules of the High Court 1980 O 35 r 2

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Civil Procedure — Action — Reinstatement of action — Claim dismissed on absence of plaintiff and plaintiff's counsel at hearing — Application to reinstate claim and to set aside counterclaim — Whether absence intentional or deliberate — Whether genuine miscommunication of trial dates — Whether merits shown in claim and in defence to counterclaim — Rules of the High Court 1980 O 35 r 2

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The appellant claimed against the defendant for breach of an agreement for transfer of shares in a company. The respondent counterclaimed for alleged overpayment over the share sale and purchase transaction. After a number of adjournments, the case was finally fixed for hearing on 16 and 17 October 2000. When the case was called up for hearing on 16 October 2000 the appellant and her counsel were absent. The respondent's counsel and his witnesses were present. After hearing submission of the respondent's counsel, the court allowed the respondent's application to dismiss the appellant's claim and gave judgment in favour of the respondent on the counterclaim. The appellant then on the very next day filed two applications, namely for reinstatement of her claim and for setting aside the judgment on the counterclaim. The appellant contended that she and her solicitors were honestly under the impression that the trial dates fixed were 17 and 18 October 2000. The appellant explained that the trial dates had been wrongly communicated by another firm of solicitors who had mentioned the matter earlier on behalf of the appellant's solicitors. The respondent objected to the applications contending that the case had been fixed for trial earlier on three occasions and the appellant had on two occasions applied for adjournment. The learned judge dismissed both applications and hence this appeal.

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Held, allowing the appeal with costs:

(1) Order 35 r 2 of the Rules of the High Court 1980 confers a wide

discretion to set aside any judgment or order obtained where one party does not appear at the trial. The court in dealing with such application must look at the reasons for the party's absence (see para 10).

(2) The conduct of the appellant and her counsel clearly and unequivocally did not reflect their intention to deliberately and intentionally absent themselves from attending the trial. It was the conduct of a party who genuinely had the intention to proceed with the trial but was unable to attend court due to an innocent mistake with regard to the trial dates. There was no evidence to show that the appellant or her counsel were avoiding trial. Any inconvenience caused to the respondent at the material time, could have been compensated by an award of costs (see para 17).

(3) The appellant in her applications had to show some merits in her claim as well as some defence on merit on the counterclaim. So long as she did that, the strength or weakness of it was immaterial (see para 18).

(4) The learned trial judge had failed to consider the reasons for the appellant and her counsel's absence on the trial date as well as the merits of the appellant's claim and her defence to the counterclaim in dealing with both appellant's applications (see para 21).

[Bahasa Malaysia summary

Perayu menuntut terhadap defendan bagi pelanggaran perjanjian untuk pemindahan saham dalam sebuah syarikat. Responden membuat tuntutan balas bagi lebihan bayaran yang dikatakan dibuat berkenaan transaksi jual beli saham tersebut. Selepas beberapa penangguhan, kes ini akhirnya ditetapkan untuk perbicaraan pada 16 dan 17 Oktober 2000. Apabila kes ini dipanggil untuk pendengaran pada 16 Oktober 2000 perayu dan peguamnya tidak hadir. Peguam responden dan saksi-saksinya hadir. Selepas mendengar hujahan peguam responden, mahkamah membenarkan permohonan responden untuk menolak tuntutan perayu dan mencatatkan penghakiman berpihak kepada responden atas tuntutan balas tersebut. Perayu kemudian pada hari keesokan memfailkan dua permohonan, iaitu permohonan untuk menghidupkan semula tuntutannya dan untuk mengetepikan penghakiman yang dicatatkan atas tuntutan balas tersebut. Perayu menyatakan bahawa dia dan peguamcaranya secara jujur beranggapan bahawa tarikh perbicaraan ditetapkan pada 17 dan 18 Oktober 2000. Perayu menjelaskan bahawa tarikh-tarikh perbicaraan tersebut telah dimaklumkan secara salah oleh firma guaman yang telah menyebut bagi pihak peguamcara perayu bagi perkara tersebut sebelum ini. Responden membantah permohonan-permohonan tersebut dan menyatakan bahawa kes ini telah dahulunya ditetapkan untuk perbicaraan sebanyak tiga kali dan perayu telah dua kali memohon

penangguhan. Hakim yang bijaksana menolak kedua-dua permohonan dan justeru itu rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Aturan 35 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 memberikan budi bicara yang luas untuk mengetepikan apa-apa penghakiman atau perintah yang diperolehi akibat ketidakhadiran mana-mana pihak semasa perbicaraan. Mahkamah dalam memutuskan permohonan sedemikian mesti menimbangkan alasan-alasan bagi ketidakhadiran pihak tersebut (lihat perenggan 10).

(2) Kelakuan perayu dan peguamnya jelas dan nyata tidak mencerminkan niat mereka untuk sengaja tidak menghadiri perbicaraan tersebut. Ia merupakan kelakuan suatu pihak yang benar-benar mempunyai niat untuk meneruskan dengan perbicaraan tersebut tetapi tidak dapat hadir di mahkamah disebabkan suatu kesilapan tidak sengaja berhubung dengan tarikh-tarikh perbicaraan. Tidak ada apa-apa keterangan untuk menunjukkan bahawa perayu atau peguamnya cuba mengelak perbicaraan. Apa-apa kesulitan terhadap responden pada masa material boleh dipampas melalui satu award kos (lihat perenggan 17).

(3) Perayu dalam permohonan-permohonannya terpaksa menunjukkan merit dalam tuntutannya serta pembelaan bermerit terhadap tuntutan balas tersebut. Selagi dia melakukan sebegitu, kekuatan atau kelemahannya adalah tidak material (lihat perenggan 18).

(4) Hakim perbicaraan terpelajar tersebut telah gagal untuk menimbangkan alasan-alasan ketidakhadiran perayu dan peguamnya pada tarikh bicara serta merit tuntutan perayu dan pembelaannya terhadap tuntutan balas dalam memutuskan kedua-dua permohonan perayu (lihat perenggan 21).]

Notes

For a case on absence of party in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 1.

For cases on reinstatement of action, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 160–167.

Cases referred to

Buga Singh v Koh Bon Keo [1967] 1 MLJ 16, HC (refd)

Burgoine v Taylor (1878) 9 Ch D 1, CA (refd)

Cockle v Joyce (1877) 7 Ch D 56 (refd)

Hayman v Rowlands [1957] 1 All ER 321, CA (refd)

Shocked & Anor v Goldschmidt & Ors [1998] 1 All ER 372, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 35 r 1(2)

Appeal from: Suit No 22–160 of 1995 (High Court, Johor Bahru)

Dominic J Puthucheary (Firoz Hussein with him) (Puthucheary Firoz & Mai) for the appellant.

PK Nathan (Fadzilah Mansor with him) (PK Nathan & Co) for the respondent.

Ramly Ali JCA:

[1] The present appeal is against the decision of the learned High Court judge dated 26 February 2002 wherein the learned High Court judge had dismissed with costs the appellant's application for reinstatement of his claim and his application to set aside the judgment dated 16 October 2000 on the respondent's counterclaim.

FACTUAL BACKGROUND

[2] The appellant's claim against the defendant is for breach of an agreement dated 8 February 1988 to transfer 55% shares in a company known as R & I Securities Sdn Bhd to the appellant being the shares promised by the respondent to be held by the appellant for assisting the respondent to set up the said company but later being transferred to a third party.

[3] The respondent's counterclaim is for a liquidated sum of RM507,999.50 being an overpayment over the sale and purchase of shares transaction to the appellant.

[4] The appellant's claim was filed on 28 June 1995 whilst the respondent's defence and counterclaim were filed on 7 October 1995. The appellant filed her reply and defence to counterclaim on 1 November 1995.

[5] After a number of adjournments, the case was finally fixed for hearing on 16 and 17 October 2000. When the case was called up for hearing on 16 October 2000 the appellant and her counsel were absent. The respondent's counsel was present. So were the respondent and his witnesses. The respondent's counsel requested that the appellant's claim be dismissed with costs under O 35 r 1(2) of the Rules of the High Court 1980 ('the RHC') and that the respondent be allowed to proceed with the trial on his counterclaim. After hearing submission of the respondent's counsel, the court allowed the respondent's application to dismiss the appellant's claim and proceeded with the hearing of the respondent's counterclaim in the absence of the appellant and her counsel. The court then gave judgment in favour of the respondent on the counterclaim.

[6] The appellant then on the same day filed two applications, namely for reinstatement of her claim and for setting aside the judgment on the counterclaim made on 16 October 2000.

[7] To support her applications, the appellant contended that she and her solicitors Dato' Dominic J Puthucheary and Asmat bin Nasruddin were in Johore Bahru at all material times (15 October 2000 and 16 October 2000) and they were genuinely and honestly under the impression that the trial dates fixed were 17 and 18 October 2000. The appellant explained that the disparity of the trial/hearing dates arose due to the miscommunication and misunderstanding of the dates when the same were communicated to the appellant's solicitors by another firm of solicitors who attended and mentioned on behalf of the appellant's solicitor on the mention date when the trial dates were fixed. According to the appellant her counsel were present at the Johor Bahru High Court on 16 October 2000 (to meet the appellant and to prepare for the trial), but they were unaware that the case was called up on that day (16 October 2000) which they had mistaken it to be on 17 October 2000 and 18 October 2000, until they were informed by the respondent's counsel at 4pm on 16 October 2000 that her claim had been dismissed and judgment on the counterclaim was given in favour of the respondent against the appellant.

[8] In objecting the applications, the respondent contended that the case had been fixed for trial earlier on three occasions and the appellant had on two out of the three occasions applied for adjournment, that the respondent had assembled all his witnesses and had incurred considerable expense in securing the attendance of one of his witnesses who resides in England and the respondent was ready to proceed with the trial of the appellant's claim as well as the respondent's counterclaim.

[9] On 26 February 2000 the learned judge dismissed both the applications to reinstate the appellant's claim as well as the application to set aside the judgment entered on the counterclaim.

THE RELEVANT LAW

[10] Order 35 r 2 of the RHC confers a wide discretion to set aside any judgment or order obtained where one party does not appear at the trial, on the application of that party on such terms as the court thinks just. The court in dealing with such application must look at the reasons for the party's absence. The terms in such circumstances are usually that the party in default pays the costs of the day, which include all costs thrown away by reason of the trial becoming abortive and the costs of the application to reinstate the case to the list (see *Burgoine v Taylor* (1878) 9 Ch D 1 at p 5; and *Cockle v Joyce* (1877) 7 Ch D 56).

[11] In *Buga Singh v Koh Bon Keo* [1967] 1 MLJ 16, His Highness Raja Azlan Shah J had adopted a sound principle on the same issue laid down in the case of *Hayman v Rowlands* [1957] 1 All ER 321 where Denning LJ said:

> I have always understood that, if by some oversight or mistake a party does not appear at the court on the day fixed for the hearing, and judgment goes against him but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but, so long as he does so, the strength or weakness of it does not matter.

[12] The most important consideration in this type of application is whether the appellant had given sufficient and reasonable reasons for her or her counsel's absence on the trial date. In the leading authority of *Shocked & Anor v Goldschmidt & Ors* [1998] 1 All ER 372 the Court of Appeal held that on an application to set aside a judgment given after a trial in the absence of the applicant, the predominant consideration of the court is not whether there is a defence on the merits but the reason why the applicant was absent. If the absence was deliberate and not due to an accident or mistake, the court would be unlikely to allow a rehearing.

THE PRESENT CIRCUMSTANCES

[13] On the facts before the court, the evidence clearly shows that the absence of the appellant and her counsel were not deliberate and was due to a genuine belief that the trial dates fixed were 17 and 18 October 2000. The secretary to Dato' Dominic J Puthucheary (the appellant's counsel) had telephoned the court on 10 October 2000 and was informed that the trial would proceed on 17 October 2000 and 18 October 2000. Then on 13 October 2000 the appellant's solicitors sent a letter to the court stating, inter alia, their understanding that trial was fixed for the 17 and 18 October 2000. A copy of the letter was sent to the respondent's solicitors.

[14] Lead counsel for the appellant (Dato' Dominic J Puthucheary) flew to Johor Bahru on 15 October 2000, while Encik Asmet bin Nasruddin, his co counsel flew to Johor Bahru on the first flight on 16 October 2000. Both counsel spent time with the appellant on 16 October 2000 preparing for the trial.

[15] The appellant's counsel rushed to the court on 16 October 2000 (after 4pm) on being told that the case was heard and disposed of on that day. The appellant's counsel appeared before the learned judge the very next morning on 17 October 2000 to seek clarification and explain their absence in court on 16 October 2000.

[16] The appellant's counsel filed both the applications for reinstatement and setting aside the judgment the very next day, ie 17 October 2000.

[17] The conduct of the appellant and her counsel clearly and unequivocally do not reflect their intention to deliberately and intentionally absent themselves from attending the trial. It is the conduct of a party who genuinely had the intention to proceed with the trial but was unable to attend court due to an innocent mistake with regard to the trial dates. There was no evidence to show that the appellant or her counsel were avoiding trial. Any inconvenience caused to the respondent at the material time, could have been compensated by an award of costs.

MERIT OF THE APPELLANT'S CLAIM AND DEFENCE TO COUNTERCLAIM

[18] The appellant in her applications must also show some merits in her claim as well as some defence on merit on the counterclaim. So long as she does that, the strength or weakness of it is immaterial (see *Buga Singh v Koh Bon Keo* and *Hayman v Rowlands*).

[19] In summary, the appellant's claim is for the transfer of 55% of shares in a company known as R & I Securities Sdn Bhd based on a statutory declaration dated 12 August 1987 and an agreement in writing dated 8 February 1988 between the appellant and the respondent where the respondent is alleged to have agreed to transfer the said shares to the appellant. The respondent admitted signing both the statutory declaration and the said agreement. The respondent's only pleaded defence is that both the documents were signed 'in haste'.

[20] In relation to the counterclaim, the appellant's defence is that the RM500,000 (as claimed by the respondent in the counterclaim) was paid to the appellant as a repayment by the respondent, of a loan (of the same amount) provided by the appellant to the respondent. Thus the appellant claims that there is no issue of overpayment as alleged.

CONCLUSION

[21] All the above considerations pertaining to the reasons for the appellant and her counsel's absence on the trial date (16 October 2000) as well as the merits of the appellant's claim and her defence to the counterclaim must be properly considered by the court in dealing with both appellant's applications to reinstate her claim and to set aside the judgment dated 16 October 2000 on the counterclaim. The learned judge had clearly failed to do so.

[22] The appellant must be given the opportunity to defend herself in circumstances where her absence from trial was not intentional, deliberate or contumelious.

[23] On the above considerations, this court unanimously allowed the appeal with costs. The order of the High Court dated 16 October 2000 is set aside. The appellant's claim is reinstated and the judgment on the counterclaim is set aside.

Appeal allowed with costs.

Reported by Kanesh Sundrum